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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

6 **Attorney for Plaintiffs MIRSAD HAJRO and JAMES R. MAYOCK**

7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11
12 MIRSAD HAJRO, JAMES R. MAYOCK

13 Plaintiffs,

14 v.

15 UNITED STATES CITIZENSHIP
16 AND IMMIGRATION SERVICES,
17 T. DIANE CEJKA, Director
18 USCIS National Records Center,
19 ROSEMARY MELVILLE,
20 USCIS District Director of San Francisco,
21 MICHAEL CHERTOFF, Secretary
22 Department of Homeland Security,
23 MICHAEL B. MUKASEY, Attorney General
24 Department of Justice
25 Defendants

Civil Action No.

RMW

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

RS

26 **I. INTRODUCTION**

27 This is an action under the Freedom of Information Act, 5 U.S.C. 552, as
28 amended, ("FOIA") to order the production of agency records related to Plaintiff
Hajro which have been improperly withheld from him. This lawsuit also seeks
injunctive relief to enforce the strict time requirements under FOIA. Finally,
this action seeks to enforce the terms of a nationwide settlement agreement
related to FOIA entered into between Plaintiff Mayock and Defendants and their

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1 predecessors for the benefit of aliens such as Plaintiff Hajro

2 3 II. PARTIES

4 1. Plaintiff, Mirsad Hajro is a lawful permanent resident and resides in
5 San Jose, California. His alien registration number is A77 428 444. He
6 previously was the plaintiff in *Hajro v. Gonzales* No. C 06-7827 JW.

7 2. James R. Mayock is an immigration attorney who resides in San
8 Anselmo, California. He practices immigration law in San Francisco,
9 California.

10 3. Defendant United States Citizenship And Immigration Services
11 ("USCIS") is an agency within the Department of Homeland Security which has
12 the custody and control of alien registration files. USCIS is also charged by law
13 with the duty of adjudicating N-400 applications for naturalization under
14 8 U.S.C. §1430 (a). USCIS is an agency within the meaning of 5 U.S.C. §552(f).

15 4. Defendant T. Diane Cejka is sued in her official capacity as the
16 Director of the USCIS National Records Center. The National Records Center
17 ("NRC") is the central repository of the agency's alien files and records
18 responds to FOIA requests for copies of these records. The NRC also is the
19 office which has possession of the records Plaintiffs seek.

20 5. Defendant Rosemary Melville is sued in her official capacity as the
21 District Director of the USCIS San Francisco District Office. The District
22 Director has oversight responsibilities over the San Jose Field Office where
23 Plaintiff Hajro's naturalization appeal is pending. In addition, the San
24 Francisco District Office was named in the original settlement agreement which
25 is a subject of this lawsuit.

26 6. Defendant Michael Chertoff is sued in his official capacity as the

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1 Secretary of the Department of Homeland Security¹. In this capacity he has
2 responsibility for the administration and enforcement of the immigration laws
3 pursuant to 8 U.S.C. §1103(a) including the accurate, efficient and secure
4 processing of immigration benefits.

5 7. Defendant Michael B. Mukasey is sued in his official capacity as the
6 Attorney General of the United States and is charged with the authority and
7 duty to direct, manage, and supervise all employees and all files and records of
8 the Department of Justice. The Department of Justice signed a nationwide
9 settlement agreement on May 21, 1992 which is a subject of this lawsuit.

11 III. JURISDICTION

12 8. This Court has jurisdiction over this action pursuant to 5 U.S.C.
13 §552(a)(4)(B) (Freedom Of Information Act), 5 U.S.C. §551 *et seq.*, 5 U.S.C. §
14 555(b), §702, §704 and §706 (Administrative Procedure Act), and 28 U.S.C.
15 §1331 (federal question) as this action arises under the Freedom of Information
16 Act. 5 U.S.C. §552 *et seq.*

17 9. This Court has jurisdiction to enforce the settlement agreement
18 reached in *Mayock v. Immigration And Naturalization Service*, Civil No. C-85-
19 5169-CAL (N.D. Cal), ("the Settlement Agreement").

20 10. The aid of the Court is invoked under 28 USC §§ 2201 and 2202,
21 authorizing a declaratory judgment.

22 //

25 ¹Since March 1, 2003, the Department of Homeland Security is the
26 agency responsible for implementing the Immigration and Nationality Act. See
27 6 U.S.C. §271(b)(5) and 6 U.S.C. § 557.

IV. VENUE

11. Venue is proper in the Northern District of California since a substantial part of the events or omissions giving rise to the claim occurred in Northern California.

V. INTRADISTRICT ASSIGNMENT

12. This lawsuit should be assigned to the San Jose Division of this Court because a substantial part of the events which give rise to this lawsuit, namely the denial of Plaintiff Hajro's citizenship application and the pending appeal of the citizenship application, occurred in San Jose, California. In addition, Plaintiff Hajro resides in San Jose, California.

VI. REMEDY SOUGHT

13. Plaintiff Hajro seeks to have the Court compel Defendants to provide him with a copy of his alien registration file forthwith.

14. Plaintiffs seek to have the Court issue an order directing Defendants to amend "Track Three" processing of FOIA requests (see ¶21) to comply with the Settlement Agreement's procedures for expedited processing.

15. Plaintiffs seek to have the Court issue an order directing Defendants to amend "Track Three" processing of FOIA requests (see ¶21) to provide for priority processing upon proof that substantial due process rights of the requestor would be impaired by the failure to process immediately.

16. Plaintiffs seek a permanent injunction requiring Defendants to:

A) provide a copy of a requestor's file within the twenty day time limit mandated in 5 U.S.C. §552(a)(6)(A);

B) give written notice if a twenty day extension of time is needed in unusual

1 circumstances as mandated by §552(a)(6)(B);

2 C) establish a procedure to advise a requestor of his/her right and the
3 procedures to appeal the decision if a request for expedited processing is
4 denied.

6 VII. STATEMENT OF FACTS

7 Plaintiff James Mayock

8 17. Plaintiff Mayock has filed several FOIA requests on behalf of his
9 clients seeking copies of their alien registration files. It has taken more than
10 20 days for Defendants to produce the records in these cases.

11 18. Plaintiff Mayock was the plaintiff in *Mayock v. I.N.S.*, 714 F. Supp
12 1558 (N.D. Cal.1989), rev'd and remanded *sub nom. Mayock v. Nelson*, 938 F.
13 2d 1006 (9th Cir. 1991).

14 19. As a result of the litigation in that case, Plaintiff Mayock entered into
15 a Settlement Agreement with Defendants and their predecessors².
16 (*Exhibit A*).

17 20. Under the terms of the Settlement Agreement:

19 **Expedited Processing for Demonstrated Exceptional Need or Urgency**

20 A requestor who demonstrates, consistent with applicable
21 guidances and law, an "exceptional need or urgency", shall have
22 his/her request processed out of turn on an "expedited" basis. The
23 currently applicable guidance...provides that FOIA offices are to
24 grant such treatment when the requestor demonstrates that:

25 ²The Settlement Agreement is published in a law review article: "*Freedom*
26 *Of Information Act Response Deadlines: Bridging The Gap Between Legislative*
27 *Intent And Economic Reality* by Eric Sinrod, *The American University Law*
28 *Review*, Winter 1994 , Volume 43, Number 2, p. 325.

a. an individual's life or personal safety would be jeopardized by the failure to process a request immediately; or

b. substantial due process rights of the requestor would be impaired by the failure to process immediately, and the information sought is not otherwise available.

Procedures for Expedited Processing

A request for expedited processing which demonstrates either of the above circumstances shall be processed immediately.

A request which fails to meet the above criteria shall be denied expedited processing and shall be processed on the appropriate track. A requestor must be notified in writing of the decision not to grant the request for expedited treatment, and advised of his/her right and the procedures to appeal the decision...

21. Currently, Defendants use a multi track system for responding to FOIA requests, consisting of three tracks:

*Track One:*³ Simple requests.

*Track Two:*⁴ Complex inquiries that normally necessitate additional search and review time.

*Track Three:*⁵ Expedited processing for individuals scheduled for a hearing before an immigration judge.

22. Tracks One and Two were implemented on April 29, 1992. (*Exhibit B*).

³"Track 1 is for less complex requests that can be processed in 20 working days or less." 72 Fed. Reg. 9017 (2/28/07)

⁴"Track 2 is for complex requests that require more than 20 working days to process and that include searching and line-by-line review of numerous pages of information." 72 Fed. Reg. 9017 (2/28/07)

⁵Referred to as the "Notice To Appear" track. 72 Fed. Reg. 9017(2/28/07)

1 23. "Track Three" was implemented on March 30, 2007. (*Exhibit C*)

2 24. On January 26, 2008, pursuant to paragraph 10 of the Settlement
3 Agreement, Plaintiff Mayock sent a notification of breach of the Settlement
4 Agreement to the District Director of the USCIS San Francisco District Office.
5 (*Exhibit D*)

6 25. Plaintiff Mayock has received no reply to this letter.

7 26. On information and belief, FOIA requests are no longer processed
8 by local districts, such as the San Francisco District Office.

9 27. Plaintiff Mayock was not notified by Defendants of this change of
10 procedure under the Settlement Agreement and is unaware of the exact date
11 that this change in practice occurred.

12 28. Currently, all FOIA requests for files of aliens compiled by USCIS
13 are processed in one centralized location at the National Records Center in
14 Lee's Summit, Missouri.

15 29. On January 26, 2008, Plaintiff Mayock also sent a notification of
16 breach to the Director of the National Records Center of the Department of
17 Homeland Security. (*Exhibit D*)

18 30. Plaintiff Mayock has received no reply to this letter.

19
20 Plaintiff Mirsad Hajro

21 31. Plaintiff Hajro is a beneficiary under the Settlement Agreement.

22 32. Plaintiff Hajro applied for naturalization on November 6, 2003 under
23 8 U.S.C. § 1430(a). (*Exhibit E*)

24 34. Plaintiff Hajro was interviewed on March 4, 2004 at the USCIS Field
25 Office in San Jose, California.

26 35. Plaintiff Hajro made several inquiries about the status of his
27

1 citizenship application and was informed each time that his application could
2 not be acted upon because the FBI background name check was pending.

3 36. Plaintiff Hajro filed a Petition For Hearing On Naturalization
4 Application Under 8 U.S.C. §1447(b) *in pro per* on December 21, 2006.

5 37. The case was assigned to the Honorable James Ware. (*Hajro v.*
6 *Gonzales* C 06-7827 JW).

7 38. On or about August 24, 2007, the parties filed a joint "Stipulation
8 For Remand and Dismissal" stating that "the necessary name check and FBI
9 background check investigations have been completed, and that USCIS is now
10 ready to complete the adjudication and issue a decision on the Plaintiff's
11 application for Naturalization."

12 39. Pursuant to this stipulation, Judge Ware dismissed the case
13 without prejudice on August 30, 2007. (*Exhibit F*)

14 40. Plaintiff Hajro's application for naturalization was denied on October
15 9, 2007 based on alleged evidence in his alien registration file. (*Exhibit G*)

16 41. Plaintiff Hajro filed an appeal of this decision under 8 U.S.C. §1447(a)
17 on or about November 9, 2007 and requested a hearing on Form N-336.
18 (*Exhibit H*)

19 42. Plaintiff Hajro filed a FOIA request for a copy of his alien registration
20 file on November 19, 2007. (*Exhibit I*)

21 43. Plaintiff Hajro specifically requested expedited processing pursuant
22 to the Settlement Agreement.

23 44. Plaintiff Hajro's FOIA request was accompanied by a letter from his
24 lawyer dated November 7, 2007 which explained that Plaintiff Hajro needed a
25 copy of the file to see the alleged evidence upon which the denial was based
26 and prepare his appeal. (*Exhibit J*)

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1 45. Since substantial due process rights of the requestor would be
2 impaired by the failure to process immediately, and the information sought was
3 not otherwise available, the letter argued that this request qualified for
4 expedited processing under the terms of the Settlement Agreement.

5 46. On November 19, 2007 Defendants issued a letter denying Plaintiff
6 Hajro's request for expedited processing because Plaintiff Hajro is not
7 scheduled for a hearing before an immigration judge. (*Exhibit K*)

8 47. On November 19, 2007 Defendants issued another letter
9 acknowledging receipt of Plaintiff Hajro's FOIA request and placing it on the
10 "complex track". His case number is NRC2007075364. (*Exhibit L*)

11 48. On information and belief, Plaintiff alleges that the processing time
12 for both "Track One" and "Track Two" cases is currently up to 18 months.
13 (*Exhibit M*)

14 49. On information and belief, Plaintiff alleges that the vast majority of
15 requests for alien registration files involve less than 100 pages of material in a
16 single file located at a single location at the National Records Center, and do
17 not require consultation with another agency or the search of other offices.

18 50. More than twenty days have passed since the Plaintiff Hajro filed his
19 FOIA request and he has not received a copy of his file.

20 51. Plaintiff Hajro treated this as an adverse determination pursuant to
21 6 C.F.R. §5.6(c) and 5 U.S.C. §552(a)(6)(A).

22 52. Plaintiff Hajro filed an administrative appeal of this denial pursuant
23 to 6 CFR. §5.9(a)(1) on or about December 26, 2007. (*Exhibit N*)

24 53. More than twenty days have passed since this appeal was filed and
25 no substantive reply has been received. Plaintiff Hajro has treated this as a
26 denial of his appeal pursuant to 5 U.S.C. §552(a)(6)(A).

1 54. The delay in responding to Plaintiff Hajro's FOIA request is not
2 attributable to Plaintiff Hajro.

3 55. Plaintiff Hajro has been and will continue to be irreparably harmed
4 because of the unreasonable delay of Defendants in providing the information
5 requested under the Freedom Of Information Act because without a copy of the
6 file, Plaintiff Hajro's attorney cannot prepare his appeal adequately.

7 56. Plaintiff Hajro has exhausted the applicable administrative remedies
8 with respect to the FOIA request to USCIS.

9 **VIII. FIRST CAUSE OF ACTION**

10 57. Defendants' current multi track policy allows expedited processing
11 only in cases for aliens scheduled for a hearing before an immigration judge.
12 (*Exhibit O*). This violates the Settlement Agreement in that it does not provide a
13 procedure for a requestor to demonstrate that either A) their life or personal
14 safety would be jeopardized by the failure to process a request immediately or
15 B) substantial due process rights would be impaired by the failure to process
16 immediately in cases other than immigration judge hearings.⁶

17 58. Defendants have undermined the interests protected by the
18 Settlement Agreement by gutting its essential due process protections for aliens
19 who need copies of their files in order to have due process for appeals, motions
20 to reopen, and fair hearings in situations *other than hearings before an*
21 *immigration judge*.

22
23 ⁶Examples of such cases include, but are not limited to: appeals of
24 denials of citizenship under 8 U.S.C. §1447, appeals to the Board of
25 Immigration Appeals under 8 C.F.R. §1003.3, appeals to the Administrative
26 Appeals Office under 8 C.F.R. §103.3, appeals to the Legalization Appeals
27 Office under 8 C.F.R. §245a.2(p), and persons with final orders of deportation
28 filing a motion to reopen or reconsider under 8 C.F.R. §1003.2.

1 59. Plaintiffs contend that Defendants have the right to amend, change,
2 revise, or terminate their practices and policies pursuant to paragraph eleven
3 of the Settlement Agreement as long as they do not violate the essence of the
4 Agreement in terms of providing some sort of mechanism to expedite the
5 requestor's file in cases where a person's life or personal safety is at risk or
6 where substantial due process rights of the requestor would be impaired.

7 60. Plaintiffs allege that both "Track Three" and 6 C.F.R. §5.5(d) violate
8 the Settlement Agreement in that they do not provide a requestor for expedited
9 processing an opportunity to demonstrate that substantial due process rights
10 would be impaired by the failure to process immediately, and the information
11 sought is not otherwise available.

12 61. In this case, the information sought is not otherwise available
13 because there is no discovery in immigration proceedings.

14 15 **IX. SECOND CAUSE OF ACTION**

16 62. The denial of expedited processing of Plaintiff Hajro's FOIA request
17 violates the Settlement Agreement in that 1) Plaintiff Hajro demonstrated that
18 substantial due process rights (i.e. the right to a fair hearing under 8 U.S.C.
19 1447(a)) would be impaired without access to the evidence used to deny his
20 citizenship application and 2) the denial failed to advise Plaintiff Hajro of his
21 right or any procedures to appeal the decision.

22 23 **X. THIRD CAUSE OF ACTION**

24 63. The failure to provide Plaintiff Hajro with the requested material, i.e.
25 a copy of his alien registration file, within 20 days of his request violates 5
26 U.S.C. §552(a)(6)(A) and 6 C.F.R. §5.6(b).

XI. FOURTH CAUSE OF ACTION

64. The failure to notify Plaintiff Hajro of the "unusual circumstances" which prevents the agency from processing his request within the 20 day statutory limit and the failure to notify him of the date by which processing of his request can be expected to be completed violates 6 C.F.R. § 5.5(c)(1).

65. Plaintiff Hajro alleges that Defendants cannot demonstrate "unusual circumstances" as defined in 5 U.S.C. §552(a)(6)(B) to extend the twenty day statutory time limit in Plaintiff Hajro's case.

XII. FIFTH CAUSE OF ACTION

66. Plaintiffs allege that Defendants have a pattern or practice of failing to comply with the time requirements set forth in 5 U.S.C. § 552(A), (B), (C).

XIII. SIXTH CAUSE OF ACTION

67. Defendants' action in withholding the requested information was arbitrary and capricious under 5 U.S.C. §551 *et seq.*, 5 U.S.C. § 555(b), §702, §704 and §706, the Administrative Procedure Act.

68. Defendants have willfully and unreasonably delayed and refused to provide Plaintiffs with the information requested both under FOIA and the terms of the Settlement Agreement.

69. Plaintiff Hajro has a right to a copy of the requested documents under both the Settlement Agreement and 5 U.S.C. §552(a)(3).

70. There is no legal basis for Defendants' failure to provide Plaintiff Hajro a copy of the requested material in a timely manner.

XIV. PRAYER

71. WHEREFORE, Plaintiffs pray this Court:

(A) Find that Defendants' multi track policy is in violation of the terms of the Settlement Agreement in that it does not provide priority treatment for cases where the requestor demonstrates that 1) an individual's life or personal safety would be jeopardized by the failure to process a request immediately; or 2) substantial due process rights of the requestor would be impaired by the failure to process immediately.

(B) Order Defendants to amend "Track Three" to comply with the terms of the Settlement Agreement concerning the procedures for Expedited Processing of FOIA requests so that all aliens (not just those scheduled for a hearing before an immigration judge) who can demonstrate that substantial due process rights would be impaired by the failure to process immediately, are considered for expedited processing.

(C) Order Defendants to amend "Track Three" processing of FOIA requests to provide for priority processing upon proof that substantial due process rights of the requestor would be impaired by the failure to process immediately.

(D) Find that 6 C.F.R. §5.5(d) violates the Settlement Agreement in that this regulation does not provide a requestor for expedited processing an opportunity to demonstrate that substantial due process rights would be impaired by the failure to process immediately.

(E) Find that Defendants are in violation of the Freedom Of Information Act by failing to comply with the time requirements set forth in 5 U.S.C. § 552(a)(6)(A), (B), and (C).

(F) Issue a permanent injunction requiring Defendants to 1) provide a

1 copy of a requestor's file within the twenty day time limit mandated in 5 U.S.C.
2 §552(a)(6)(A); 2) give written notice if a twenty day extension of time is needed
3 in unusual circumstances as mandated by §552(a)(6)(B); establish a procedure
4 to advise a requestor of his/her right and the procedures to appeal the decision
5 if a request for expedited processing is denied.

6 (G) Find that the failure to provide Plaintiff Hajro with the requested
7 material within 20 days of his request violates 5 U.S.C. §552(a)(6)(A) and
8 6 C.F.R §5.6(b).

9 (H) Find that the failure to provide notification of the "unusual
10 circumstances" which prevents the agency from processing Plaintiff Hajro's
11 request within the 20 day statutory limit and the failure to notify him of the
12 date by which processing of his request can be expected to be completed
13 violates 6 CFR § 5.5(c)(1).

14 (I) Find that Defendants' denial of Plaintiff Hajro's request violated 5
15 U.S.C. §552(a)(6)(E) in that the denial failed to provide for expeditious
16 consideration of an administrative appeal of the denial of expedited processing.

17 (J) Find that the agency action in this case was "arbitrary and
18 capricious".

19 (K) Order Defendants to provide Plaintiff Hajro with a copy of his alien
20 registration file forthwith.

21 (L) Award Plaintiff reasonable attorney's fees and costs of court and

22 (M) Grant such other relief at law and in equity as the Court may deem
23 just and proper.

24 DATED: March 7, 2008

25
26 
27 Kip Evan Steinberg
Attorney for Plaintiffs HAJRO & MAYOCK